Supreme Court, U.S.
FILED

10-644 NOV 10 2010

OFFICE OF THE CLERK

175

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

GRUMA CORPORATION,
Petitioner,

v.

GUADALUPE AREVALO,
ON BEHALF OF HIMSELF AND OTHERS SIMILARLY SITUATED,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

A remand order not based on either a lack of subject matter jurisdiction or a timely-raised procedural defect is appealable. In addition, the Class Action Fairness Act ("CAFA") makes an order remanding a class action appealable with permission of the court of appeals. The district court *sua sponte* remanded this class action based on a perceived rule against successive removals, not for lack of subject matter jurisdiction or a timely-raised procedural defect. Because the remand order was independently appealable, was Petitioner required to appeal with permission under CAFA in order to create subject matter jurisdiction in the court of appeals?

LIST OF PARTIES TO THE PROCEEDINGS

Petitioner Gruma Corporation was the Defendant in the district court and the Appellant in the court of appeals.

Respondent Guadalupe Arevalo was the Plaintiff in the district court and the Appellee in the court of appeals.

CORPORATE DISCLOSURE STATEMENTS

Pursuant to Rule 29.6 of the Rules of this Court, Petitioner Gruma Corporation states the following:

Gruma Corporation (also doing business as "Mission Foods") is a Nevada corporation with its principal place of business in Irving, Texas. Gruma, S.A. de C.V., a corporation organized and existing under the laws of the Republic of Mexico, is the parent company of Gruma Corporation and owns 100% of its stock. Archer Daniels Midland Corporation directly and indirectly owns ten percent or more of the stock of Gruma, S.A. de C.V.

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Gruma Corporation ("Gruma") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The court of appeals' order was not published in the Federal Reporter and is included in the Appendix. App. A-1 to -2. The district court's order was not published in the Federal Supplement and is also included in the Appendix. App. A-6 to -8.

JURISDICTION

The court of appeals entered its order on May 17, 2010. App. A-1. A timely petition for panel rehearing and rehearing en banc was denied on August 12, 2010. App. A-9 to -10. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1447 [hereinafter "Section 1447"], provides in pertinent part:

> (c) A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after filing of the notice of removal under Section 1446(a).
>
> . . .
>
> (d) An order remanding a case to State court from which it was removed

> is not reviewable on appeal or otherwise
> . . .

28 U.S.C. § 1453 [hereinafter "Section 1453"], part of the Class Action Fairness Act of 2005 ("CAFA"), Pub. L. No. 109-2, § 5, 119 Stat. 4, which provides in pertinent part:

> (c)(1) Section 1447 shall not apply to any removal of a case under this section, except that notwithstanding section 1447(d), a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a class action to the state court from which it was removed if application is made to the court of appeals not more than 10 days after entry of the order.

28 U.S.C. § 1332(d), as enacted by CAFA, which provides in pertinent part:

> (d)(2) The district courts shall have original jurisdiction over any civil action in which the matter in controversy exceeds the sum or value of $5,000,000 . . . and is a class action in which (A) any member of a class of plaintiffs is a citizen of a State different from any defendant . . . .

PRELIMINARY STATEMENT

The Court of Appeals incorrectly decided an important question of federal law that this Court should review. The Court of Appeals held that a party appealing a remand order in a removed class action must obtain leave from the court of appeals to do so under Section 1453(c)(1), even when the remand order is otherwise appealable and not subject to Section 1447(d). Further, by treating the district court's remand order, which was *sua sponte* and based solely upon a perceived rule against successive removals, as subject to Section 1447(d), the Court of Appeals' order conflicts with a decision by the Seventh Circuit Court of Appeals in *Benson v. SI Handling, Inc.*, 188 F.3d 780, 782 (7th Cir. 1999), which explicitly held that a remand based upon a perceived rule against successive removal was not subject to Section 1447(d) and could be appealed. The Court should grant this Petition for a Writ of Certiorari to resolve this conflict and settle an important issue of federal procedural law.

STATEMENT OF THE CASE

1. Proceedings in the California Superior Court and the first removal.

On March 24, 2009, Plaintiff Guadalupe Arevalo, a California resident and former Gruma employee, sued Gruma in California Superior Court for Los Angeles County for alleged violations of the California Labor Code. App. A-91 to -118. Gruma, a Nevada Corporation the principal place of business of which is located in Texas, removed the case on

June 12, 2009, to the District Court for the Central District of California. App. A-80 to -90. In its Notice of Removal, Gruma asserted federal jurisdiction under 28 U.S.C. § 1332(b), the general federal diversity of citizenship statute. App. A-80 to -82, -84 to -88. Although Arevalo sought to sue on behalf of himself and a class of similarly situated persons, Gruma did not remove on the basis of 28 U.S.C. § 1332(d)(2) because it was unclear at the time whether the aggregate amount in controversy exceeded $5 million.

2. The first remand, second removal, and second remand.

The District Court immediately issued an "Order to Show Cause re Remand to State Court" ordering Gruma to offer evidence, not later than July 15, 2009, sufficient to show that (1) its principal place of business was located in Texas, (2) the amount in controversy was at least $75,000, and (3) removal was timely. App. A-64 to -79, -66 to -67, -69 to -70, and -77.

Gruma filed its Response to the District Court's Order to Show Cause on July 15, 2009. The District Court held that the individual amount in controversy requirement was not met and remanded the case to the Superior Court for Los Angeles County on July 17, 2009. App. A-35 to -36.

On July 13, 2009, two days before Gruma's response to the District Court's Order to Show Cause was due, Arevalo had filed a First Amended Complaint in the District Court. App. A-37 to -63.

The First Amended Complaint made more detailed class allegations. App. A-47 to -53. On August 11, 2009, Gruma filed a second Notice of Removal addressing the First Amended Complaint. App. A-11 to -34. In this notice of removal, Gruma alleged jurisdiction under CAFA, 28 U.S.C. § 1332(d), based on the class allegations contained in the First Amended Complaint. App. A-18 to -25.

Arevalo did not challenge the second removal. However, without notice to either party or a hearing, the District Court *sua sponte* remanded the case to the Superior Court for Los Angeles County. App. A-6 to -8. In its *sua sponte* order remanding the case, the District Court relied only on a perceived rule against successive removals; the Court did not address whether it had subject matter jurisdiction under CAFA. App. A-7.

Gruma timely filed its Notice of Appeal to the Ninth Circuit Court of Appeals. Because the second remand order was not based on either a lack of subject matter jurisdiction or a procedural defect timely-raised by motion, Gruma did not request permission to appeal under Section 1453(c)(1).

3. Proceedings in the Court of Appeals.

On February 17, 2010, the Clerk of the Court of Appeals issued an Order to Show Cause why the appeal should not be dismissed for lack of subject matter jurisdiction. App. A-3 to -5. Both parties filed briefing on the issue. On May 17, 2010, the Court of Appeals issued an Order dismissing the appeal for lack of jurisdiction. App. A-1 to -2. The

panel held that, because Gruma failed to seek leave under Section 1453(c)(1) to appeal the district court's *sua sponte* order remanding the case, the Court of Appeals lacked jurisdiction over the appeal. *Id.* Gruma timely filed a Petition for Panel Rehearing and for Rehearing En Banc. *See* App. A-9 to -10. On August 12, 2010, the Court of Appeals denied that Petition. App. A-9 to -10.

REASONS FOR GRANTING THE PETITION

I. A defendant has the unconditional right to appeal to the court of appeals a district court's *sua sponte*, non-jurisdictional remand order when neither Section 1453(c)(1) nor Section 1447(d) applies to the appeal.

Generally, a party has an unconditional right to appeal a district court's erroneous rulings to the court of appeals. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 10 (1983) (allowing appeal of an order the effect of which was "that there would be no further litigation in the federal forum"); *see also Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 712-15 (1996) (holding that an order remanding a case to state court is an appealable final order). The removal statutes provide a limited exception to that rule.

Section 1447(d), when read together with Section 1447(c), prohibits the appeal of "[a]n order remanding a case to State court from which it was removed" where the remand is based on either a lack of subject matter jurisdiction or a timely motion to

remand raising a defect in removal procedure. *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 127-28 (1995); *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 343-45 (1976), *overruled on other grounds by Quackenbush*, 517 U.S. at 714-15. Remand orders based on a lack of subject matter jurisdiction or a timely-raised procedural defect accordingly "are immune from review." *Thermtron*, 423 U.S. at 345-46; *Gravitt v. Sw. Bell Tele. Co.*, 430 U.S. 723 (1977) (per curiam) ("The District Court's remand order was plainly within the bounds of [Section] 1447(c) and hence was unreviewable by the Court of Appeals, by mandamus or otherwise.").

Remand orders not based on either a lack of subject matter jurisdiction or a timely-raised procedural defect remain unconditionally appealable. Examples of the broad array of remand orders not subject to Section 1447(d)'s prohibition on appeal include:

- A district court's heavy docket, which might "unjustly delay a trial on the merits," *Thermtron Prods.*, 423 U.S. at 343-44;
- *Burford* abstention, *Quackenbush*, 517 U.S. at 711-13;[1]

[1] Moreover, *Quackenbush* explicitly gives the court of appeals jurisdiction over appeals of remand orders not subject to Section 1447(d)'s prohibition under the collateral order doctrine. *Quackenbush*, 517 U.S. at 714-15 (holding that district court's order remanding a case based on *Burford* abstention was immediately appealable as a collateral order).

- A district court's decision to decline to exercise supplemental jurisdiction under 28 U.S.C. § 1367(c), *Carlsbad Technology, Inc. v. HIF Bio, Inc.*, 556 U.S. __, 129 S. Ct. 1862, 1866-67 (2009);
- A district court's *sua sponte* remand for procedural defects not raised by either party, *e.g.*, *Kelton Arms Condominium Owners Ass'n, Inc. v. Homestead Ins. Co.*, 346 F.3d 1190, 1192 (9th Cir. 2003)[2]; and
- A policy against successive removals, *Benson v. SI Handling, Inc.*, 188 F.3d 780, 781-82 (7th Cir. 1999).

The district court's *sua sponte* remand order based solely on the policy against successive removals is not due to a lack of subject matter jurisdiction or a timely-raised procedural defect;[3] Therefore, it is not governed by Section 1447(c), and Section 1447(d) does not prohibit Gruma from appealing the order. *Quackenbush*, 517 U.S. at 711-13; *Thermtron Prods.*, 423 U.S. at 343-44.

A relatively new provision, Section 1453(c)(1), provides a discretionary exception to the Section

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[2] *See also Whole Health Chiropractic & Wellness, Inc. v. Humana Med. Plan, Inc.*, 254 F.3d 1317 (11th Cir. 2001); *In re FMC Corp. Packaging Sys. Div.*, 208 F.3d 445 (3d Cir. 2000); *Page v. City of Southfield*, 45 F.3d 128 (6th Cir. 1995); *In re Cont'l Cas. Co.*, 29 F.3d 292 (7th Cir. 1994); *In re Allstate Ins.*, 8 F.3d 219 (5th Cir. 1993).

[3] Nor could there be any such basis, because Arevalo never raised by motion any alleged procedural defect, and the Court never considered the merits of the removal. App. A-6.

1447(d) exception to the rule of general appealability. That section allows a court of appeals to decide to accept an appeal of an order remanding a case removed under CAFA "notwithstanding section 1447(d)." By its own language, Section 1453(c)(1) does not apply if Section 1447(d) would not prohibit such an appeal. *See Hertz Corp. v. Friend*, 130 S. Ct. 1181, 1187 (2010) (narrowly construing Section 1453(c)(1) as an exception to Section 1447(d)); *BP Am., Inc. v. Oklahoma ex rel. Edmondson*, 613 F.3d 1029, 1033 (10th Cir. 2010) (noting that "Congress has specifically and explicitly suspended the operation of § 1447(d) with respect to CAFA remand orders arising, like this one, under § 1453(c)(1)" and reading Section 1447 "as a whole, together with [Section] 1453[(c)(1)].").

Because Section 1447(d) does not prohibit Gruma's immediate appeal of the District Court's *sua sponte* remand order, Section 1453(c)(1) does not apply, and Gruma was not required to invoke obtain approval from the court of appeals in order to appeal the order. The Court of Appeals' ruling that it lacked subject matter jurisdiction because Gruma did not obtain permission to appeal is therefore incorrect and should be reversed.

II. The Court should grant this Petition because the Court of Appeals' order misconstrues an important federal law and conflicts with the opinion of another court of appeals.

The Court of Appeals' failure to review the District Court's *sua sponte* remand order conflicts

with the Seventh Circuit's decision in *Benson v. SI Handling, Inc.*, holding that a remand order based on the perceived rule against successive removals was immediately appealable because it was not subject to Section 1447(d)'s prohibition. 188 F.3d 780, 781-82 (1999). The Court should grant this Petition to resolve that conflict.

The Court of Appeals' decision also contravenes Congress's intent in liberalizing appellate review of remand orders. Congress passed CAFA in 2005 to, among other reasons, "provid[e] for Federal court consideration of interstate cases of national importance under diversity jurisdiction." Pub. L. No. 109-2, § 2(b), 119 Stat. 4. An important part of Congress's method to achieve this purpose was the broadening of appellate review of remand orders in class actions through Section 1453(c)(1). *See Hertz Corp. v. Friend*, 130 S. Ct. 1181, 1187 (2010) (rejecting a formulaic reading of Section 1453(c)(1) and interpreting it as an "exception to [the] more general jurisdictional rule" embodied in Section 1447(d)). The Ninth Circuit's ruling turns this exception intended to facilitate appellate review into an unyielding hurdle *all* class action defendants must clear, even those whose appeal is not barred by Section 1447(d). This will result (as it has in this case) in more limited appellate review for class action defendants. This is the opposite result of what Congress intended, and is an erroneous reading of an important federal law.

Treating an appeal not required to be taken under Section 1453(c)(1) as subject to its requirements has other consequences beyond the

requirement that the appellant seek permission from the court of appeals. For example, Section 1453(c)(2) imposes a strict 60-day deadline on the court of appeals hearing the case. 28 U.S.C. § 1453(c)(2) ("If the court of appeals accepts an appeal under paragraph (1), the court shall complete all action on such appeal . . . not later than 60 days after the date on which such appeal was filed . . . ."); *see also Hertz Corp.*, 130 S. Ct. at 1187 (discussing Section 1453(c)(2)'s deadlines). There is no such deadline for the appeal of a remand order not subject to Section 1447(d).

That the Court of Appeals decision is unpublished raises the importance of review by this Court. For those practitioners who find this decision by electronic research, they will be confused by the conflict with the Seventh Circuit. For those in the Ninth Circuit who are unaware of this decision, this silent rule limiting appeals of class action remands will deprive their clients of an unconditional right to appeal.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be granted and the Order of the court of appeals reversed.

Respectfully submitted,

By:

_____

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

[FILED: MAY 17, 2010
MOLLY C. DWYER,
CLERK, U.S. COURT
OF APPEALS]

GUADALUPE AREVALO, on behalf of himself and others similarly situated,	No. 09-56478
	D.C. No. 2:09-cv-05839-DSF
Plaintiff – Appellee,	Central District of California, Los Angeles
v.	
GRUMA CORPORATION, a/k/a Mission Foods,	ORDER
Defendant – Appellant.	

Before: LEAVY, RAWLINSON and CALLAHAN, Circuit Judges.

We have reviewed the response to this court's order to show cause why this appeal should not be dismissed for lack of jurisdiction. We conclude that we lack jurisdiction to review the district court's remand order because appellant failed to seek leave of the court to appeal the remand order. *See* 28 U.S.C. § 1453(c)(1); *see* also *United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Industrial Workers Int'l Union, et al. v. Shell Oil Co., et al.*, No. 10-55269, 2010 WL 1571190, at *2 (9th Cir. April 21, 2010) ("We have jurisdiction pursuant to 28 U.S.C. § 1453(c) . . ."). Accordingly, this appeal is dismissed.

DISMISSED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

[FILED: FEB. 17, 2010
MOLLY C. DWYER,
CLERK, U.S. COURT
OF APPEALS]

GUADALUPE AREVALO, on behalf of himself and others similarly situated,	No. 09-56478
	D.C. No. 2:09-cv-05839-DSF
Plaintiff – Appellee,	Central District of California, Los Angeles
v.	
GRUMA CORPORATION, a/k/a Mission Foods,	ORDER
Defendant – Appellant.	

A review of the record suggests that this court may lack jurisdiction over the appeal because an

order remanding a removed class action to state court is not reviewable "on appeal or otherwise" under 28 U.S.C. § 1447(d). *See* 28 U.S.C. § 1447(d); *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 127 (1995); *Kunzi v. Pan Am. World Airways, Inc.*, 833 F.2d 1291, 1293 (9th Cir. 1997).

Further, to the extent appellant challenges the remand to state court following a removal under the Class Action Fairness Act, appellant was required to comply with Federal Rule of Appellate Procedure 5. See 28 U.S.C § 1453(c).

Within 21 days after the date of this order, appellant shall move for voluntary dismissal of this appeal or show cause why it should not be dismissed for lack of jurisdiction. If appellant elects to show cause, a response may be filed within 10 days after service of the memorandum.

If appellant does not comply with this order, the Clerk shall dismiss this appeal pursuant to Ninth Circuit Rule 42-1.

Briefing and the motion for stay are held in abeyance pending further order of the court.

FOR THE COURT:

Molly Dwyer
Clerk of Court

By: Katrina K. Corbit
9th Cir. R. 27-7

Case No. CV 09-5839 DSF (RCx) Date 9/1/09

Title Guadalupe Arevalo, et al. v. Gruma Corporation, et al.

Present: The Honorable DALE S. FISCHER, United States District Judge

Debra Plato	Not Present
Deputy Clerk	Court Reporter
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Not Present	Not Present

Proceedings: (In Chambers) Order REMANDING Case to Superior Court

On August 11, 2009, Defendant removed this matter from state court on the basis of diversity jurisdiction under the Class Action Fairness Act. The case was previously removed on June 12, 2009. (*See Arevalo v. Gruma Corp.*, CV 09-4207 DSF (RCx).) This Court issued on Order to Show Cause re Subject Matter Jurisdiction on June 29, 2009 Defendant responded on July 15, 2009. The response was insufficient and the matter was remanded by this Court on July 17, 2009.

Defendant has removed the case again. Generally, removal after remand is not allowed if the second removal is on the same basis as the first. *See Seedman v. U.S. Dist. Ct.*, 837 F.2d 413, 414 (9th Cir. 1988); *Peabody v. Maud Van Cortland Hill Schroll Trust*, 892 F.2d 772, 776 (9th Cir. 1990); *Midlock v. Apple Vacations West, Inc.*, 406 F.3d 453, 456-57 (7th Cir. 2005). However, a second removal is allowed where different grounds for or evidence in support of removal become available after the first removal. *See Peabody*, 892 F.2d at 776; *Midlock*, 406 F.3d at 457.

Defendant argues that new evidence in the form of Plaintiffs amended complaint excuses its removal after remand. It does not. Defendant admits that the amended complaint was "filed and served" on July 13, 2009. (Notice of Removal 4.) The amended complaint is not "new" evidence — it was available two days before Defendant's response to the Court's order to show cause was due and four days before the Court remanded the case. Defendant could have and should have cited the amended complaint in support of its argument during the first remand proceeding. Defendant failed to convince the Court that subject matter jurisdiction was present and now has removed in an attempt to try again using evidence that was available before the first remand. This is what the successive removal bar prohibits.

The case is REMANDED to the Superior Court of California for the County of Los Angeles.

IT IS SO ORDERED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

[FILED: AUG 12, 2010
MOLLY C. DWYER,
CLERK, U.S. COURT
OF APPEALS]

GUADALUPE AREVALO, on behalf of himself and others similarly situated,	No. 09-56478
	D.C. No. 2:09-cv-05839-DSF
Plaintiff – Appellee,	Central District of California, Los Angeles
v.	
GRUMA CORPORATION, a/k/a Mission Foods,	ORDER
Defendant – Appellant.	

Before: LEAVY, RAWLINSON and CALLAHAN, Circuit Judges.

Appellant's petition for panel rehearing is construed as a motion for reconsideration. So construed, the motion is denied. *See* 9th Cir. R. 27-10. Appellant's petition for panel rehearing en banc is construed as a motion for reconsideration en banc. So construed, the motion is denied on behalf of the court. *See* 9th Cir. Gen. Ord. 6.11.

No further filings shall be accepted in this closed case.

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[FILED: AUG 11, 2009, CLERK, U.S. DISTRICT COURT, CENTRAL DISTRICT OF CALIF., LOS ANGELES]

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

GUADALUPE AREVALO, on behalf of himself and others similarly situated,
Plaintiff,

v.

GRUMA CORPORATION; MISSION FOODS; and DOES 1 to 100, inclusive,
Defendants.

Case No.: CV09-5839 (PSG CWx))

DEFENDANT GRUMA CORPORATION'S NOTICE OF REMOVAL OF CIVIL ACTION

[Los Angeles County Superior Court Case No. BC 410322]

[Previously removed to

United Stated District Court for the Central District of California and assigned Case No. CV-09-04207DSF (RCx)]

TO THE CLERK OF THE COURT, PLAINTIFF AND HIS ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that Defendant Gruma Corporation (also known as "Mission Foods ") [hereinafter, "Gruma" or "Defendant"], through undersigned counsel, hereby removes the above-captioned action from the Superior Court of the State of California for the County of Los Angeles, to the United States District Court for the Central District of California, pursuant to 28 U.S.C. §§ 1332, 1367, 1441, and 1446.

I. BACKGROUND

1. On or about March 24, 2009, Plaintiff commenced this action by filing an unverified Complaint in the Superior Court of California, Los Angeles County, entitled *Guadalupe Arevalo v. Gruma Corporation; Mission Foods: and Does 1 to 100, inclusive*, and bearing the docket number BC410322 (the "Complaint"). The Complaint was served on May 13, 2009. (A true and correct copy of the Complaint is attached as Exhibit "A" to this Notice of Removal.)

2. Gruma timely removed this action to federal court on June 12, 2009 on the grounds of diversity jurisdiction under 28 U.S.C. § 1332(a). The action was assigned Case No. CV 09-04207DSF (RCx). On June 29, 2009, this Court (Fischer, J.) issued an Order to Show Cause Re Remand to State Court asking Gruma to provide evidence that its removal was timely, that it is a citizen of Nevada or Texas, as alleged in the Notice of Removal, and that the amount in controversy exceeds the jurisdictional limit.

3. On July 15, 2009, Gruma submitted its Response to the Court's Order to Show Cause Re Remand. On July 17, 2009, this Court (Fischer, J.) remanded the action to state court on the grounds that there was insufficient evidence that the amount in controversy requirement under 28 U.S.C. § 1332(a) was satisfied. (Order Remanding Action To State Court [dkt. #35][1].

4. On July 13, 2009, Plaintiff filed and served a First Amended Complaint ("FAC"). The FAC asserts claims for: (1) Failure to Pay Minimum or Contractual Wages In Violation of Labor Code §§ 1194, 1197 *et seq.*; (2) Failure to Pay Overtime Wages in Violation of Labor Code §§ 1194 and 510; (3) Failure to Provide Accurate Wage Statements in

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[1] All citations to previous proceedings in federal court regarding this action are to the docket in *Guadalupe Arevalo v. Gruma Corporation, et al.*, United States District Court, Central District of California, Case No. CV 09-04207DSF (RCx).

Violation of Labor Code § 226; (4) Violation of Labor Code §§ 201 and 202 Resulting in § 203 Wages and Penalties for Failure to Pay Wages Due Former Employees at the Time of Resignation and/or Discharge; (5) Violation of Business and Professions Code Sections 17200 *et seq.* (A true and correct copy of the FAC is attached as Exhibit "B" to this Notice of Removal.)

5. The FAC adds new allegations that Defendant maintained a policy "which applied to all of its hourly non-exempt employees which required them to clock in at least five (5) minutes prior to start of their shift." (FAC ¶ 13.) The FAC also alleges for the first time that Defendant "had a [sic] universal payroll policies and procedures that applied to all of the hourly non-exempt employees, which failed to compensate the hourly non-exempt employees . . . for all of the worked hours that were on their timecards, such as the five (5) minutes at the beginning of the shifts as well as the minutes at the end of their shift." (FAC ¶ 14.)

6. Defendants answered the FAC on August 7, 2009. (A true and correct copy of Defendant's Answer is attached as Exhibit "C" to this Notice of Removal.)

7. As set out more fully below, the FAC now establishes that this Court has original jurisdiction over this action under the Class Action Fairness Act ("CAFA") 28 U.S.C. § 1332(d) and hence the action may be removed by Defendant pursuant to 28 U.S.C. § 1441. Original jurisdiction exists here

because there are at least 100 class members in all proposed plaintiff classes, the combined claims of all class members exceed $5,000,000 exclusive of interest and costs, and Gruma is a citizen of a different state than at least one class member.

II. DEFENDANT HAS SATISFIED THE PROCEDURAL REQUIREMENTS FOR REMOVAL.

A. Timelines

8. This removal is timely under 28 U.S.C. § 1446(b). Although the first paragraph of 28 U.S.C. § 1446(b) requires removal within 30 days of service of the initial complaint setting forth a removable claim, "the ground for removal must be revealed affirmatively in the initial pleading in order for the first thirty-day clock under § 1446(b) to begin." *Harris v. Bankers Life and Cas. Co.*, 425 F.3d 689, 695 (9th Cir. 2005). Where a fact necessary to establish removal jurisdiction is not included in the initial pleading, the time to remove is governed by the second paragraph of the statute and does not begin to run until Defendant receives a subsequent paper "from which it can be ascertained from the face of the document that removal is proper." *Id.* (time for removal did not begin where complaint did not allege citizenship of individual defendant).

9. The initial pleading in this matter did not reveal on its face that this matter was removable because it did not affirmatively allege the amount in controversy. Accordingly, the time for removal began

to run, at the earliest, on July 13, 2009 when Gruma received the FAC. As will be further detailed below, the FAC includes new allegations which, for the first time, enable Gruma to ascertain that it is more likely than not that the aggregate amount in controversy on Plaintiffs class claims exceeds the amount necessary for federal jurisdiction under CAFA. Accordingly, this removal is timely because it is made within 30 days of the service of the FAC.

10. Defendant's prior removal of this action and the Court's order of July 17, 2009 remanding it to state court are no barrier to this removal. The order did not make any finding regarding the citizenship of the parties or the aggregate amount in controversy on all class claims, which is the grounds for this removal. Moreover, a Defendant is entitled to remove a case after remand upon obtaining new facts or discovering new grounds supporting removal. *See, e.g., Mattel, Inc. v. Bryant*, 441 F.Supp.2d 1081, 1089 (C.D. Cal. 2005) (allowing second removal based on new evidence).

B. Consent Of Defendant

11. The Complaint names two defendants, "Gruma Corporation" and "Mission Foods." However, named Defendant "Mission Foods" is not a separate entity, but is a division within Gruma Corporation and a brand name employed by Gruma Corporation.

(Decl. of V. Ussery[2] [dkt. #32] ¶ 3 at 1:16-18.) Thus, there is but one actual defendant to this action, Gruma Corporation.

12. Thus, Defendant is the only party who must consent to removal and all defendants whose consent is required have consented to this removal.

C. **Venue**

13. The Superior Court of California, Los Angeles County is located within the Western Division of the Central District of California. Therefore, venue is proper in this Court pursuant to 28 U.S.C. 84(c)(2) because it is the "district and division embracing the place where such action-is pending." 28 U.S.C. § 1441(a).

D. **Procedural Requirements**

14. Pursuant to 28 U.S.C. § 1446(a), copies of all process, pleadings, and orders served upon Defendants are attached as Exhibits to this Notice of Removal. Pursuant to 28 U.S.C. § 1446(d), a copy of this Notice of Removal is being served upon counsel for Plaintiff and a copy is being filed with the Clerk of the Superior Court of California in Los Angeles County and with the Clerk of the Central District of California. True and correct copies of the Notice to

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[2] The Declaration of Velina Ussery was previously filed with the Court on July 15, 2009 in connection with Defendant's Response To Order To Show Cause Re Remand To State Court.

the Plaintiff and the state court shall be filed promptly.

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III. THE CASE IS REMOVABLE PURSUANT TO THE CLASS ACTION FAIRNESS ACT ("CAFA")

15. As set forth below, Plaintiff's claims as alleged in the First Amended Complaint are removable under 28 U.S.C. § 1332(d).

16. Under CAFA, the Federal District Court has jurisdiction if:

(a) There are at least 100 class members in all proposed plaintiff classes; and

(b) The combined claims of all class members exceed $5 million exclusive of interest and costs; and

(c) Any class member (named or not) is a citizen of a different state than any defendant. 28 U.S.C. §§ 1332(d)(2), 1332(d)(5)(B), 1453(a).

A. **There Are At Least 100 Class Members In All Proposed Plaintiff Classes**

17. In this action, Plaintiff seeks to represent the following four classes, which are collectively referred to as the "Wage Classes" (FAC 24):

(a) All Current and Former Hourly Employees Employed by Defendants in California at Any Time Between March 24, 2005, Through the Date Notice Is Mailed to the Class Who Were Not Compensated for All Hours Worked ("Minimum Wage Class").

(b) All Current and Fourier Hourly Employees Employed by Defendants in California at Any Time Between March 24, 2005, Through the Date Notice Is Mailed to the Class Who Worked More Than 8 Hours a Day or 40 Hours a Week and Were Not Compensated at Overtime Rate Because of Defendants' Illegal Payroll Policies and Practices ("Overtime Wage Class").

(c) All Current and Former Hourly Employees Employed by Defendants in California at Any

Time Between March 24, 2005, Through the Date Notice Is Mailed to the Class Who Received Inaccurate Itemized Statements (itemized Class")

(d) All Current and Former Hourly Employees Employed by Defendants in California at Any Time Between March 24, 2005, Through the Date Notice Is Mailed to the Class Who Did Not Receive Payment of Their Last Wages Within the Statutory Time Period ("Final Wage Class").

(Complaint at ¶ 23.)

18. Plaintiff alleges in the FAC that "there are not less than 1000 members in each of the Minimum wage class, Overtime Wage Class, and Itemized Statements Class; and the Final Wages Class, and there are not less than 1000 members in the Classes as a whole." (FAC ¶ 26(a). Thus, the first requirement for CAFA jurisdiction is satisfied.

19. In addition, Gruma's independent investigation has confirmed that there are at least 1,600 members in the Itemized Statements Class (also referred to in the FAC as the "Itemize Class"). During the year prior to this removal, Defendant has employed at least 1,600 non-exempt employees within the State of California, exclusive of those

employed at its Hayward production facility. (Decl. of L. Gross[3] ¶ 3 at 1:16-19.) As will be more fully explained below, given the allegations of the FAC, each of these employees is a member of the Itemized Statement Class.- Therefore, both Plaintiff's allegations and Gruma's evidence establish that there are significantly more than 100 class members in all proposed plaintiff classes.

B. The Combined Claims Of All Class Members Exceed $5 Million Exclusive Of Interest And Costs

20. Based on Plaintiffs allegations in the First Amended Complaint, the aggregate value of the claims of all proposed plaintiff classes exceeds the $5 million threshold needed to establish federal jurisdiction under the Class Action Fairness Act. The $5 million jurisdictional minimum may be based on aggregation of the claims of all potential class members. 28 U.S.C. § 1132(d)(6). In fact, Plaintiff's Third Cause of Action alone places more than $5m in controversy.

21. Plaintiffs Third Cause of Action seeks penalties under California Labor Code section 226(e) for failure to provide accurate itemized wage statements as required by California Labor Code section 226(a). The applicable penalty is fifty dollars for the initial pay period in which a violation occurs,

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[3] "Decl. of L. Gross" refers to the Declaration of Leil Gross filed concurrently herewith.

and one hundred dollars for each violation in a subsequent pay period, up to a maximum aggregate penalty of four thousand dollars. Cal. Lab. Code § 226(e); (FAC ¶ 53). A violation which recurs in each of 41 consecutive pay periods will yield the maximum aggregate penalty ($50 for the first violation, plus $100 for each of the next 40 violations). The applicable statute of limitations to recover penalties under California Labor Code section 226(e) is one year. Cal. Civ. Pr. Code § 340(a).

22. If the allegations of the FAC are true, Defendant owes the maximum aggregate penalty to each of at least 1,600 members of the Itemized Statements Class, yielding an aggregate total liability of at least $6,400,000. As will be detailed below, the FAC alleges that each itemized wage statement provided by Defendant to its California non-exempt workforce during the limitations period was inaccurate, giving rise to the penalty. That workforce includes at least 1,600 employees who are paid on a weekly basis. Thus, each of these 1,600 employees has received at least 41 inaccurate wage statements in the year prior to removal of this action and is entitled to the maximum penalty of $4,000.

a. If the allegations of the FAC are true, each itemized wage statement provided by Defendant to its California hourly employees within the past year was inaccurate, giving rise to the statutory penalty. According to the FAC, at all relevant times, Defendant had a policy which applied to "all of its hourly non-exempt employees"

which required them to clock in at least five (5) minutes prior to start of their shift. (FAC ¶ 13.) However, the FAC alleges, Defendant also had a "universal" payroll policy that applied "to all of the hourly non-exempt employees" which failed to compensate them for the five minutes at the beginning of their shift. (FAC ¶ 14.) As a result, the FAC alleges, Defendant owes "each of their hourly employees additional hours or minutes for every day worked." (FAC ¶ 16.)

b. Furthermore, according to the FAC, this policy "of failing to pay their employees for all of the hours worked and failure to properly compensate all overtime hours worked, resulted in DEFENDANTS providing their hourly employees, including PLAINTIFF, with inaccurate itemized wage statements in violation of Labor Code Section 226, *each and every pay period*, since they inaccurately reflected the total worked hours, inaccurately reflected the overtime hours, it inaccurately calculated the wages, as well as inaccurately calculated the overtime wages." (FAC ¶ 18 (emphasis added).) Thus, if these allegations are true, each itemized wage statement provided by Defendant to its California hourly employees during the relevant period was inaccurate, giving rise to the statutory penalty.

c. At all times during the year prior to this removal, Defendant has employed at least 1,845 hourly employees within California. (Decl. of L. Gross ¶ 3 at 1:16-21.) Of these more than 1,845 employees, at least 1,600 have been paid on a weekly

basis at all times during the year prior to this removal. (Decl. of L. Gross ¶ 3 at 1:16-19.) Thus, if the allegations of the FAC are true, each of these 1,600 employees is a member of the Itemized Statements Class and has received an inaccurate wage statement each week during the past year. Since there are 52 weeks in a year, each of these employees has received at least 41 inaccurate wage statements during the limitations period and is therefore entitled to the maximum statutory penalty of $4,000 under California Labor Code Section 226(e).

23. Hence, by his Third Cause of Action alone, Plaintiff seeks penalties of at least $6,400,000. ($4,000 multiplied by 1,600 class members). Accordingly, even setting aside the potential recovery on the other causes of action asserted in the FAC, the combined claims of all class members exceed $5 million exclusive of interests and costs and the second requirement of CAFA jurisdiction is satisfied.

24. In addition to the $6,400,000 calculated above, Plaintiff also seeks penalties under Labor Code section 226(e) for the approximately 245 California hourly employees who were paid on a bi-weekly basis. Even if these employees received only 26 wage statements during the limitations period, they would nonetheless be entitled to a penalty of $2,550 if the allegations of the FAC are true. Thus, the penalties attributable to these members of the Itemized Statements Class amount to at least $624,750.

25. In addition, the FAC seeks wages due to all California hourly employees for this uncompensated time, including overtime premium wages where applicable. Plaintiff also seeks an additional 30 days of wages for any hourly employee who separated from employment during the limitations period on the theory that these employees were not paid all wages due at the time of termination because they had not been properly compensated for all pre-shift minutes during their employment. While Defendant lacks sufficient information at this time to calculate the amount of these potential damages and penalties, it is apparent from the above that they are significant, further supporting the conclusion that the combined members of all class members exceed the $5m amount necessary to establish jurisdiction under CAFA.

C. Any Class Member Is A Citizen Of A Different State Than Any Defendant

26. For purposes of establishing diversity under CAFA, this Court need only find that there is diversity between one putative class member and the named Defendant, Gruma. 28 U.S.C. §§ 1332(d)(2), 1332(d)(5)(B), 1453(a).

1. Plaintiff is a citizen of California.

27. The FAC alleges that Plaintiff is a resident of Los Angeles County. (FAC ¶ 4.) The FAC further alleges that "at all relevant times" Defendant

employed Plaintiff at its place of business located in Los Angeles, California. (FAC ¶ 5.) According to the FAC, this employment began in 1987 and continued for over 19 years. (FAC ¶ 4.) Thus, based on the allegations of the FAC, Plaintiff has resided in California for approximately 22 years and has been employed in California during most of that period. These facts alone are sufficient to establish that Plaintiff is domiciled in California and is thus a citizen of California. *Bogan v. Northwestern Mut. Life Ins. Co.*, 103 F.Supp.2d 698, 700-01 (S.D.N.Y. 2000) (uninterrupted residence in state for two years established that plaintiff was a citizen of that state).

28. Furthermore, Plaintiff has acknowledged in papers filed in this action that he is a citizen of California (See Pl.'s Opp to Def.'s Ex Parte App. For An Extension Of Time And For Leave To Conduct Discovery, dated July 10, 2009, [dkt. #25] at 5:8-9.) In this written submission signed by his attorney, Plaintiff offered to stipulate to that he was a citizen of California in order to dissuade the Court from granting Defendant's request to take discovery regarding his domicile and citizenship. Because it was made to obtain an advantage in this litigation, the offer should be treated as a judicial admission that Plaintiff is a citizen of California. Accordingly, this Court may take it as established that Plaintiff is indeed a citizen of California for purposes of diversity jurisdiction.

2. Defendant is a citizen of Nevada or Texas.

29. Pursuant to 28 U.S.C. § 1332(c)(1), "a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business."

30. Gruma is incorporated in Nevada and is thus not a citizen of California under the first prong of-this statutory test. (Decl. of V. Ussery[4] ¶4 at 1:19-20.)

31. Gruma's principal place of business is located in Texas, which is the location of its corporate "nerve center." Under controlling Ninth Circuit law, Defendant's principal place of business is determined by the location of its corporate "nerve center" because it is a nationwide business and because no state accounts for "substantial predominance" of its corporate activities.

a. The Ninth Circuit recently held in *Davis v. HSBC Bank Nevada, NA.*, 557 F.3d 1026, 1029 (9th Cir. Feb. 29, 2009)[5], that when "a corporation has

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[4] "Decl. of V. Ussery" refers to the Declaration of Velina Ussery In Support of Gruma Corporations Response To Order To Show Cause Re Remand To State Court [dkt. # 32]. For the Court's convenience, this declaration is being refilled concurrently with this Second Notice of Removal.

[5] Gruma Corporation notes that the United States Supreme Court recently granted certiorari to review the Ninth Circuit's test for determining the principal place of-business of a corporation for purposes of diversity jurisdiction. *Hertz Corp. v. Friend*, 129 S.Ct. 2766-(Mem.) (2009). Given the uncertainty as

operations spread across many states, the nerve center test is usually the correct approach" for determining the corporation's principal place of business. Davis acknowledges that the "nerve center test" does not apply where a particular state contains "a substantial predominance of corporate operations" as measured by such factors as "the location of employees, tangible property, production activities, sources of income, and where sales take place." *Id.* at 1028. However, it also clarified the meaning of "substantial predominance." According to the Davis court, the critical inquiry is not whether the corporation's activities in one state exceed those in all other states by some particular percentage, but rather whether the nature and extent of those activities render the corporation more familiar to citizens of one state and hence less likely to suffer prejudice in the courts of that state. *Id.* at 1029-30. If not, then no state can be said to contain a "substantial predominance" of corporate operations, and the court must apply the "nerve center" test, which locates the corporation's

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to how the Supreme Court will rule, this Court should consider staying any ruling on possible remand to state court until the Supreme Court clarifies the applicable legal standard.

principal place of business in the state where "the majority of its executive and administrative functions are performed." Id. at 1028.

b. The Davis court also clarified how the "substantial predominance" test should be applied to a nationwide business. According to the Davis court, "[w]hen a corporation's activities are spread over many states, it is much less likely operations in any one state will 'substantially' predominate over operations in other states." *Id.* at 1029. The *Davis* decision also affirmed its earlier decision in *Breitman v. May Company California*, 37 F.3d 562 (9th Cir. 1994), holding that the "nerve center" test was the appropriate test to determine the principal place of business for a company with operations in over 30 states. Id. As for the Ninth Circuit's earlier decisions in *Tosco Corp. v. Communities for a Better Env't*, 236 F.3d 495 (9th Cir. 2001) and *Industrial Tectonics, Inc. v. Aero Alloy*, 912 F.2d 1090 (9th Cir. 1990), which found "substantial predominance" based on the location of corporate activities, the *Davis* court noted that, in those cases, the defendants' operations, or at least certain major categories of operations, were concentrated in just a few states with California accounting for the

majority or a near-majority of those operations. *See Davis*, 557 F.3d at 1029. Summarizing its own precedents, the Davis court emphasized that "the term 'substantially' must be defined with an eye to ensuring that a corporation is a citizen of the place in which it is least likely to suffer prejudice." *Id.* at 1029.

c. Gruma conducts operations nationwide, much like the defendants to whom the Ninth Circuit applied the "nerve center test" in *Davis* and *Breitman*. Gruma is a producer of Mexican food products with sales to consumers through retail grocery stores in 49 states under the brand name "Mission Foods." (Decl. of V. Ussery ¶ 3 at 1:16-18 & ¶ 7 at 2:3-6.) Furthermore, no state accounts for more than 50% of Gruma total sales. (Id. ¶ 7 at 2:6-7.)

d. The other aspects of Gruma's operations are dispersed among many states. Gruma employs employees in 34 different states and operates production facilities in 11 states and maintains sales offices in 8 states, 3 of which do not contain any of Gruma's production facilities. (*Id.* ¶ 8 at 2:12 & ¶ 9 at 2:16 & ¶ 2:23-26.) Moreover, Gruma makes purchases in 11 states and owns fixed assets (such as land, improvements, machinery and equipment, information

technology and vehicles) in 14 states and leases real property in 24 states. (*Id.* ¶ 15 at 3:22; ¶ 11 at 2:27-28 & ¶ 13:3:11.)

e. Gruma's operations are not so concentrated in California that it is less likely to suffer prejudice here than elsewhere. Although California does account for a higher percentage of Gruma's activities according to some indices, much of this can be accounted for by the fact that California's population is 51% larger than that of even the next most populous state — Texas. (See Gruma's Request for Judicial Notice In Support Of Response to Order To Show Cause Re Remand [dkt. # 31] Ex. A.) California does not account for a majority of Gruma's employees, fixed assets, production activities, sales, purchases or leased real property. (Decl. of V. Ussery ¶¶ 7-9 at 2:3-22, ¶ 11 at 2:27-3:2, ¶ 13 at 3:11-13, & ¶ 15 at 3:22-24.) Measured on a per capita basis, Gruma has more fixed assets and leases more real property in Texas than in California. (Decl. of V. Ussery ¶ 12 at 3:5-10, & ¶ 14 at 3:16-21.)

32. Since no state accounts for a substantial predominance of Gruma's corporate operations, its principal place of business is located

"where the majority of its executive and administrative functions are performed." *Davis*, 557 F.3d at 1028. Under that test, Gruma's principal place of business is clearly Texas, not California. Gruma's corporate headquarters are located in Irving, Texas and it conducts the majority of its administrative functions such as payroll, legal, tax, benefits and accounting at that location. (Decl. of V. Ussery ¶ 5 at 1:21-25.) Moreover, the majority of the administrative functions crucial to Gruma's day-to-day operations are conducted in its Irving, Texas location. (Decl. of V. Ussery ¶ 5 at 1:21-25.) The offices of Gruma's President, Senior Vice President -- Operations, Chief Financial Officer, and Senior Vice President -- Sales are all located at its corporate headquarters in Irving, Texas and the majority of Gruma's corporate decisions are made in Texas, including its operational, executive, administrative and policymaking decisions. (Decl. of V. Ussery ¶ 6 at 1:26-2:2.) Accordingly, Gruma's corporate "nerve center" is located in Texas and for purposes of establishing diversity jurisdiction it is a citizen of Texas and Nevada, not California.

33. Since Plaintiff and Defendant are citizens of different states, the third requirement of CAFA jurisdiction is satisfied. Moreover, because Defendant is not a citizen of California, the exceptions to CAFA jurisdiction under 28 U.S.C. § 1332(d)(3) and (d)(4) are inapplicable.

REMOVAL IS PROPER BECAUSE THIS COURT HAS SUPPLEMENTAL MATTER JURISDICTION PURSUANT TO 28 U.S.C. §§ 1332 AND 1367

34. As set forth above, this action is removable under 28 U.S.C. § 1332(d).

35. To the extent this Court would not otherwise have jurisdiction over any claim asserted in the FAC, it may exercise supplemental jurisdiction over such a claim pursuant to 28 U.S.C. § 1367.

IV. CONCLUSION

36. This Court, therefore, has original jurisdiction over Plaintiff's claims by virtue of the Class Action Fairness Act 28 U.S.C. § 1332(d)(2). This action is thus properly removable to federal court pursuant to 28 U.S.C. § 1441.

37. In the event this Court has a question regarding the propriety of this Notice of Removal, Defendant requests that it issue and Order to Show Cause so that it may have the opportunity to more fully brief the basis for this removal.

WHEREFORE, Defendant Gruma Corporation removes the above-action to this Court.

DATED: August 10, 2009

OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, PC.

By: /s/ Christopher W. Decker
Christopher W. Decker
Attorneys for Defendant
GRUMA CORPORATION (also known as
"Mission Foods")

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

JS 6

Case No. CV 09-4207 DSF (RCx) Date 7/17/09

Title Guadalupe Arevalo, et al. v. Gruma Corporation, et al.

Present: The Honorable DALE S. FISCHER, United States District Judge

Debra Plato	Not Present
Deputy Clerk	Court Reporter
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Not Present	Not Present

Proceedings: (In Chambers) Order REMANDING Action to State Court

The Court has received and reviewed Defendant's Response to Order to Show Cause re Remand to State Court. The Court finds that the amount in controversy requirement is not met and

therefore removal was improper. This action is REMANDED to the Superior Court, County of Los Angeles.

IT IS SO ORDERED.

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[FILED: JUL 13, 2009, CLERK, U.S. DISTRICT COURT, CENTRAL DIST. OF CALIF., LOS ANGELES]

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

GUADALUPE AREVALO on behalf of himself and others similarly situated. PLAINTIFF, vs.	Case No.: CV09-DSF 04207~~RSW~~L(RCx) **CLASS ACTION** **PLAINTIFF GUADALUPE AREVALO'S FIRST ~~AMENDED~~ COMPLAINT FOR DAMAGES AND EQUITABLE RELIEF FOR** **1. FAILURE TO PAY**

GRUMA CORPORATION; MISSION FOODS; and DOES 1 to 100, Inclusive.

Defendants.

MINIMUM OR CONTRACTUAL WAGES IN VIOLATION OF LABOR CODE §§ 1194, 1197, et. seq.

2. **FAILURE TO PAY OVERTIME WAGES IN VIOLATION OF LABOR CODE §§ 1194 AND 510**

3. **FAILURE TO PROVIDE ACCURATE WAGE STATEMENTS IN VIOLATION OF LABOR CODE § 226**

4. **VIOLATION OF LABOR CODE §§ 201 AND 202 RESULTING IN § 203 WAGES AND PENALTIES FOR FAILURE TO PAY WAGES DUE FORMER EMPLOYEES AT THE TIME OF**

RESIGNATION AND/OR DISCHARGE

5. VIOLATION OF BUSINESS & PROFESSIONS CODE SECTIONS 17200 et. seq.

DEMAND FOR JURY TRIAL

NOW COMES Plaintiff Guadalupe Arevalo ("PLAINTIFF"), on behalf of himself, the general public, and all others similarly situated alleging and complaining against Defendants GRUMA CORPORATION (hereinafter "GRUMA"); MISSION FOODS (hereinafter "MISSION") and DOES 1 to 100, inclusive, (hereinafter collectively referred to as "DEFENDANTS") as follows:

I. INTRODUCTION

1. This is a class action lawsuit seeking unpaid wages and interest thereon for unpaid minimum and overtime wages, statutory penalties for failure to provide accurate wage statements, waiting time penalties in the form of continuation wages for failure to timely pay employees, injunctive relief and other equitable relief, reasonable attorney's fees and costs, and interest brought on behalf of Plaintiff and others similarly situated.

II. JURISDICTION AND VENUE

2. Plaintiff filed this matter in State Court with Los Angeles Superior Court, since Plaintiff believes that this Court has no subject matter jurisdiction over this matter. Defendant however, removed this matter to District Court. Plaintiff still believes that this Court has not subject matter jurisdiction, however, since the jurisdictional matter has not be resolved by this Court yet, Plaintiff has not option but to file this First Amended Complaint with this Court, subject to filing his Motion to Remand. The Court has jurisdiction over Plaintiffs and the Class Members' claims for waiting time penalties, failure to pay minimum or overtime wages violations under Labor Code §§ 1194, 1197, 226 and 218.

3. The Court has jurisdiction over Plaintiff's and the Class Members' claims for injunctive relief, and restitution of unpaid wages and other ill-gotten benefits arising from Defendant's unlawful and/or unfair business practices under Business & Professions Code §§ 17200 *et seq.*

III. PARTIES

4. Plaintiff Guadalupe Arevalo is a Los Angeles County resident. PLAINTIFF was hired by DEFENDANTS on or about September 10, 1987, as an hourly paid employee. He remained an hourly paid employee until approximately April 2, 2007. PLAINTIFF appears in this action on behalf of himself and on behalf of all others similarly situated.

5. PLAINTIFF is informed and believes and thereon alleges that Defendant GRUMA is authorized to do business within the State of California and is doing business in the State of California and/or that Defendants DOES 1-100 are, and at all times relevant hereto were, officers, directors, or shareholders of Defendant GRUMA who were acting on behalf of Defendant GRUMA in the establishment of, or ratification, of, the aforementioned illegal payroll practices or policies. Defendant's Primary place of business is located at 5505 E. Olympic Blvd., Los Angles, California 90022 and at relevant times employed PLAINTIFF and numerous other hourly paid employees in Los Angeles County, and throughout California. Defendant has significant contacts with Los Angeles County and the activities complained of herein occurred in whole or in part, in Los Angeles County.

6. PLAINTIFF is informed and believes and thereon alleges that Defendant MISSION is authorized to do business within the State of California and is doing business in the State of California and/or that Defendants DOES 1-100 are, and at all and at all times relevant hereto were, officers, directors, or shareholders of Defendant MISSION who were acting on behalf of Defendant MISSION in the establishment of, or ratification, of, the aforementioned illegal payroll practices or policies. Defendant does business in Los Angeles County, California and at relevant times employed PLAINTIFF and numerous other hourly paid employees in Los Angeles County, and throughout California. Defendant's Primary place of business is

located at 5505 E. Olympic Blvd., Los Angles, California 90022 and at relevant times. Defendant has significant contacts with Los Angeles County and the activities complained of herein occurred in whole or in part, in Los Angeles County.

7. PLAINTIFF is informed and believes and thereon alleges that Defendants DOES 1 through 100 are corporations, or are other business entities or organizations of a nature unknown to PLAINTIFF.

8. PLAINTIFF is unaware of the true names of Defendants Does 1 through 100 Plaintiff sues said defendants by said fictitious names, and will amend this complaint when the true names and capacities are ascertained or when such facts pertaining to liability are ascertained, or as permitted by law or by the Court. PLAINTIFF is informed and believes that each of the fictitiously named defendants is in some manner responsible for the events and allegations set forth in this complaint.

9. Plaintiff is informed, believes, and thereon alleges that at all relevant times, each Defendant was an employer, was the principal, agent, partner, joint venturer, officer, director, controlling shareholder, subsidiary, affiliate, parent corporation, successor in interest and/or predecessor in interest of some or all of the other DEFENDANTS, and was engaged with some or all of the other defendants in a joint enterprise for profit, and bore such other relationships to some or all of

the other defendants so as to be liable for their conduct with respect to the matters alleged in this complaint. Plaintiff is further informed and believes and thereon alleges that each defendant acted pursuant to and within the scope of the relationships alleged relationships alleged above, and that at all relevant times, each defendant knew or should have known about, authorized, ratified, adopted, approved, controlled, aided and abetted the conduct of all other defendants. As used in this complaint, "Defendant" means "Defendants and each of them," and refers to the Defendants named in the particular cause of action in which the word appears and includes Defendants GRUMA and MISSION and Does 1 through 100.

10. At all times mentioned herein, each Defendant was the co-conspirator, agent, servant, employee, and/or joint venturer of each of the other defendants and was acting within the course and scope of said conspiracy, agency, employment, and/or joint venture and with the permission and consent of each of the other Defendants.

11. PLAINTIFF is informed and believes and thereon alleges that there exists such a unity of interest and ownership between GRUMA, MISSION and DOES 1-100, that the individuality and separateness of DEFENDANTS have ceased to exist. The business affairs of DEFENDANTS are, and at all times relevant hereto were, so mixed and intermingled that the same cannot reasonably be segregated, and the same are in inextricable confusion. Defendants GRUMA and MISSION are,

and at all times relevant hereto were, used by Defendants DOES 1-100, as a mere shell and conduit for the conduct of Defendants DOES 1-100'S affairs. The recognition of the separate existence of DEFENDANTS would not promote justice, in that it would permit DEFENDANTS to insulate themselves from liability to PLAINTIFF. Accordingly, DEFENDANTS constitute the alter ego of each other and the fiction of their separate existence must be disregarded.

12. PLAINTIFF makes the allegations in this complaint without any admission that, as to any particular allegation, PLAINTIFF bears the burden of pleading, proving, or persuading and PLAINTIFF reserves all of PLAINTIFF's rights to plead in the alternative.

IV. FACTS COMMON TO CAUSES OF ACTION

13. At all times during the liability period, DEFENDANTS had a policy and procedure which applied to all of its hourly non-exempt employees which required them to clock in at least five (5) minutes prior to start of their shift, otherwise the employees would receive a reprimand. DEFENDANTS informed their employees of this policy in employee meetings. PLAINTIFF as well as other putative class members complied with this policy and procedure almost every single day that they worked. As such, PLAINTIFF as well as other putative class members worked more than 8 hours in a day or 40 hours a week.

14. DEFENDANTS, however, had a universal payroll policies and procedures that applied to all of the hourly non-exempt employees, which failed to compensate the hourly non-exempt employees, including PLAINTIFF and numerous other putative class members, for all of the worked hours that were on their timecards, such as the five (5) minutes at the beginning of their shifts as well as the minutes at the end of their shift.

15. During all relevant times, DEFENDANTS failed to compensate PLAINTIFF and numerous other hourly non-exempt employees for all their worked hours as described above. DEFENDANTS paid their employees, including PLAINTIFF and numerous other putative class members only 8 hours per day or their scheduled shifts, without paying them for the pre and post shift minutes which were on their timecards. DEFENDANTS only paid overtime when the employees worked hours over their scheduled shift. This resulted in DEFENDANTS' failure to pay any contractual wages or even minimum wages for these minutes.

16. DEFENDANTS' failure to compensate each employee for all of the hours and/or minutes that they worked, resulted in violation of Labor Code Sections 1194 and 1197. DEFENDANTS owe each of their hourly employees additional hours or minutes for every day worked.

17. Due to DEFENDANTS' illegal policies and practices of failing to compensate their

employees for all of the hours or minutes worked, resulted in DEFENDANTS' failure to pay PLAINTIFF as well as other non-exempt employees, on numerous occasions, overtime wages when they worked in excess of eight (8) hours a day or 40 hours a week, in violation of Labor Code Sections 510 and 1194.

18. DEFENDANTS' illegal policies and procedure of failing to pay their employees for all of the hours worked and failure to properly compensate all overtime hours worked, resulted in DEFENDANTS providing their hourly employees, including PLAINTIFF, with inaccurate itemized wage statements in violation of Labor Code Section 226, each and every pay period, since they inaccurately reflected the total worked hours, inaccurately reflected the overtime hours, it inaccurately calculated the wages, as well as inaccurately calculated the overtime wages.

19. DEFENDANTS failed to provide former employees, including PLAINTIFF, with final wages which included compensation for all minimum wage and overtime hours worked, as explained above, within the statutory time period in compliance with applicable Labor Code sections.

20. At all times during the liability period, DEFENDANTS employed PLAINTIFF and numerous other similarly situated hourly employees at various locations in Los Angeles County and throughout the state of California. PLAINTIFF is informed and believes and thereon alleges that

DEFENDANTS employed more than 1,000 hourly employees throughout California during the liability period.

21. PLAINTIFF is a member of and seeks to be class representative for the Minimum wage class, Overtime Wages Class, Itemized Statements Class, and Final Wages Class as defined below. As used herein, the general term "Class" includes PLAINTIFF and all members of the Minimum wage class, Overtime Wages Class, Itemized Statements Class, and Final Wages Class.

22. PLAINTIFF seeks 1) wages for all hours worked; 2) overtime wages for all overtime hours worked; 3) statutory penalties under Labor Code Section 226(e); 4) continuation wages under Labor Code Section 203; and 4) restitution under Business and Professions Code Section 17203 of all monies owed but unlawfully withheld by Defendant.

V. CLASS DEFINITIONS AND CLASS ALLEGATIONS

23. Plaintiff brings this action on behalf of himself, on behalf of all others similarly situated, and on behalf of the General Public, and as a member of a Class defined as follows:

A. **All Current and Former Hourly Employees Employed by Defendants in California at Any Time Between March 24, 2005, Through the Date**

Notice Is Mailed to the Class Who Were Not Compensated for All Hours Worked ("Minimum Wage Class")

B. All Current and Former Hourly Employees Employed by Defendants in California at Any Time Between March 24, 2005, Through the Date Notice Is Mailed to the Class Who, Worked More Than 8 Hours a Day or 40 Hours a Week and Were Not Compensated at Overtime Rate Because of Defendants' Illegal Payroll Policies and Practices ("Overtime Wage Class")

C. All Current and Former Hourly Employees Employed by Defendants in California at Any Time Between March 24, 2005, Through the Date Notice Is Mailed to the Class Who Received Inaccurate Itemized Statements "Itemize Class")

D. All Former Employees Employed by Defendants in California at Any Time Between March 24, 2005,

Through the Date Notice Is Mailed to the Class Who Did Not Receive Payment of Their Last Wages Within the Statutory Time Period ("Final Wage Class").

24. The above defined Classes are collectively referred to as "Wage Classes".

25. This action has been brought and may be properly maintained as a class action pursuant to Code of Civil Procedure Section 382.

26. **Community of Interest:** This action has been brought and may be maintained as a class action pursuant to Code of Civil Procedure Section 382 because there is a well-defined community of interest among many persons who comprise a readily ascertainable class.

(a) The Class members are so numerous that the individual joinder of all of them as named plaintiffs is impractical. While the exact number of Class members is unknown to PLAINTIFF at this time, PLAINTIFF is informed and believes and thereon alleges that there are not less than 1000 members in each of the Minimum wage class, Overtime Wages Class, and Itemized Statements Class; and the Final Wages Class, and there are not less than 1000 members in the Classes as a whole. The precise number of Class members and their addresses are unknown to PLAINTIFF, however PLAINTIFF is informed and believes that

the number can be obtained from DEFENDANTS' records. Class members may be notified of the pendency of this action by electronic mail, the Internet, other mail, or published notice.

(b) Common questions of law and fact exist as to members of the Class and predominate over any questions which affect only individual members of the Class. These common questions include, but are not limited to:

i. Whether DEFENDANTS illegally failed to compensate their employees for all hours worked in the Minimum Wage Class;

ii. Whether DEFENDANTS failed to compensate the Overtime Class members that worked more than 8 hours a day, or 40 hours a week at the overtime rate because of DEFENDANTS' illegal payroll policies and procedures;

iii. Whether DEFENDANTS failed to provide the Itemized Statements Class Members with accurate itemized statement at the time they received their itemized statements;

iv. Whether DEFENDANTS failed to provide the Final Wages Class Members with their final wages after separation from employment within the Statutory time period;

v. Whether DEFENDANTS committed unlawful business acts or practice within

the meaning of Business and Professions Code §§ 17200 *et seq.*;

vi. Whether Class Members are entitled to unpaid wages, waiting time penalties and other relief in conjunction with their claims;

vii. Whether, as a consequence of DEFENDANTS' unlawful conduct, the Class Members are entitled to restitution, and/or equitable relief; and

viii. Whether DEFENDANTS' affirmative defenses, if any, raise any common issues of law or fact as to PLAINTIFF, and the Class Members as a whole.

27. **Typicality**: PLAINTIFF'S claims are typical of the claims of the members of the Wage Classes because PLAINTIFF, as an hourly paid employee was exposed to the same unlawful business practices as the members of the Wage Classes. PLAINTIFF sustained the same types of damages and losses that members of the classes sustained.

28. **Adequacy**: PLAINTIFF is an adequate representative of the Wage Classes because his interests do not conflict with the interests of the members of the Classes he seeks to represent. PLAINTIFF has retained counsel competent and experienced in complex class action litigation and PLAINTIFF intends to prosecute this action vigorously. The interests of the members of the

Classes will be fairly and adequately protected by PLAINTIFF and his counsel.

29. **Superiority and Substantial Benefit:** Prosecuting separate actions by individual class members creates a risk of inconsistent or varying adjudications with respect to individual class members that established incompatible standard of conduct for DEFENDANTS.

30. Question of law and fact common to Wage Classes' Members predominate over any questions affecting only individual class members and the class action is superior to other available means for the fair and efficient adjudication of PLAINTIFF'S and the Class members' claims. The damages suffered by each individual Class member may be limited. Damages of such magnitude are small given the burden and expense of individual prosecution of the complex and extensive litigation necessitated by DEFENDANTS' conduct. Further, it would be virtually impossible for the Class members to redress the wrongs done to them on an individual basis. Even if members of the Class themselves could afford such individual litigation, the court system could not. Individualized litigation increases the delay and expense to all parties and the court system, due to the complex legal and factual issues of the case. By contrast, the class action device presents far fewer management difficulties, and provides the benefits of single adjudication, economy of scale, and comprehensive supervision by a single court.

31. In the alternative, the Class should be certified because:

(a) The prosecution of separate actions by individual members of the Classes would create a risk of inconsistent or varying adjudications with respect to individual Class members which would establish incompatible standards of conduct for DEFENDANTS;

(b) The prosecution of separate actions by individual members of the Classes would create a risk of adjudications with respect to them, which would, as a practical matter, be dispositive of the interests of the other Class members not parties to the adjudications, or substantially impair or impede their ability to protect their interests; and

(c) Defendant has acted or refused to act on grounds generally applicable to the Class, and/or the General Public, thereby making appropriate final and injunctive relief with respect to the class as a whole.

FIRST CAUSE OF ACTION

FAILURE TO PAY MINIMUM OR CONTRACTUAL WAGES FOR ALL HOURS WORKED (Against all DEFENDANTS)

32. PLAINTIFF incorporate paragraphs 1 through 29 of this complaint as if fully alleged herein.

33. At all relevant times, PLAINTIFF and the other members of the Minimum Wage Class were employees of DEFENDANTS covered by Labor Code Section 1197, Wage Order 1-2001 and Wage Order MW-2001.

34. Pursuant to Labor Code Section 1197, Wage Order 1-2001 and Wage Order MW-2001, PLAINTIFF and the other members of the Minimum Wage Class were entitled to receive minimum wages or their contractual wages for all hours worked.

35. DEFENDANTS failed to pay PLAINTIFF and other members of the Minimum Wage Class minimum wages for all hours worked in violation of Labor Code Section 1197, Wage Order 1-2001 and Wage Order MW-2001. PLAINTIFF is informed and believes and thereon alleges that at all relevant times within the limitations period applicable to this cause of action, DEFENDANTS maintained a policy or practice of not paying hourly employees wages for all the hours they actually worked.

36. PLAINTIFF is informed and believes and thereon alleges that at all relevant times within the limitations period applicable to this cause of action, DEFENDANTS' payroll policies and procedures failed to compensate employees for all of the hours worked and only paid for 8 hours a day.

37. PLAINTIFF is informed and believes and thereon alleges that at all relevant times within the limitations period applicable to this cause of

action DEFENDANTS' illegal compensation of wages resulted in DEFENDANTS' failure to compensate each employee for all hours worked in violation of Labor Code Sections 1194 and 1197.

38. As a result of DEFENDANTS' unlawful conduct, PLAINTIFF and members of the Minimum Wage Class have suffered damages in an amount, subject to proof, to the extent they were not paid minimum wages for all hours actually worked.

39. Pursuant to Labor Code Sections 1194 and 1194.2, Plaintiffs and members of the Minimum Wage Class are entitled to recover the full amount of unpaid minimum wages, interest thereon, liquidated damages, reasonable attorney's fees and costs of suit.

SECOND CAUSE OF ACTION

FAILURE TO PAY OVERTIME WAGES
(Against all DEFENDANTS)

40. PLAINTIFF hereby incorporate by reference paragraphs 1-36 above, as if fully set herein by reference.

41. At all relevant times, PLAINTIFF and the other members of the Overtime Wages Class were employees of DEFENDANTS covered by Labor Code sections 510, 1194 and Wage Order 1-2001.

42. Pursuant to Labor Code sections 510, 1194 and Wage Order 4-2001 PLAINTIFFS and the other members of the Overtime Wages Class were entitled to receive overtime wages at a rate of 1.5

times their regular rate of pay for any hours worked in excess of eight (8) hours in a day and/or 40 hours in a week.

43. PLAINTIFF is informed and believes and thereon alleges that at all relevant times within the limitations period applicable to this cause of action, DEFENDANTS' payroll policies and procedures failed to compensate their employees for all hours worked and compensate them only compensated them for 8 hours day or 40 hours a week only regardless of the employee actual work hours.

44. DEFENDANTS' illegal payroll practices resulted in DEFENDANTS' failure to pay PLAINTIFF and the other members of the Overtime Wages Class overtime wages to those employees that worked in excess of eight (8) hours a day or 40 hours a week for the combined minutes in violation of Labor Code Sections 510, 1194 and Wage Order 1-2001.

45. As a result of DEFENDANTS' unlawful conduct, PLAINTIFF and members of the Overtime Wages Class have suffered damages in an amount, subject to proof, to the extent they were not paid a proper overtime rate for the minutes worked overtime worked.

46. Pursuant to Labor Code Sections 1194 and 1194.2, PLAINTIFF and members of the Overtime Wages Class are entitled to recover the full amount of unpaid overtime wages, interest thereon,

liquidated damages, reasonable attorney's fees and costs of suit.

THIRD CAUSE OF ACTION

FAILURE TO PROVIDE ACCURATE WAGE STATEMENTS
(Against all Defendants)

47. PLAINTIFF incorporates paragraphs 1 through 43 of this complaint as if fully alleged herein.

48. At all relevant times, PLAINTIFF and the other members of the Itemized Statements Class were employees of DEFENDANTS covered by Labor Code Section 226 and Wage Order 1-2001.

49. Pursuant to Labor Code Section 226(a) and Wage Order 1-2001, PLAINTIFF and the other members of the Itemized Statements Class were entitled to receive, semimonthly or at the time of each payment of wages, an accurate itemized statement showing: a) gross wages earned; b) the total hours worked by the employee; c) net wages earned; and d) all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee.

50. DEFENDANTS failed to provide PLAINTIFF and members of the Itemized Statements Class accurate itemized statements in accordance with Labor Code Section 226(a). PLAINTIFF is informed and believes and thereon

alleges that at all relevant times within the limitations period applicable to this cause of action, DEFENDANTS' payroll policies and procedures of not compensating their employee for all hours worked and only compensating for 8 hours a day. DEFENDANTS maintained a policy or practice of not paying PLAINTIFF and other members of the Itemized Statements Class wages for all hours worked, but only paying wages for the understated number of hours inaccurately reported as worked on wage statements.

51. DEFENDANTS' failure to provide PLAINTIFF and members of the Itemized Statements Class with accurate wage statements was knowing and intentional. DEFENDANTS had the ability to provide PLAINTIFF and members of the Itemized Statements Class accurate wage statements but intentionally provided wage statements that DEFENDANTS knew were not accurate.

52. As a result of DEFENDANTS' conduct, PLAINTIFF and members of the Itemized Statements Class have suffered injury. The absence of accurate information on their wage statements has prevented earlier challenges to DEFENDANTS unlawful pay practices, required discovery and mathematical computations to determine the amount of wages owed, caused difficulty and expense in attempting to reconstruct time and pay records, and/or led to the submission of inaccurate information about wages and amounts deducted

from wages to state and federal government agencies.

53. Pursuant to Labor Code Section 226(e), PLAINTIFF and members of the Itemized Statements Class are entitled to recover fifty dollars for the initial pay period within the applicable limitations period in which a violation of Labor Code Section 226 occurred and one hundred dollars for each violation of Labor Code Section 226 in a subsequent pay period, not to exceed an aggregate penalty of four thousand dollars per employee.

54. Pursuant to Labor Code Sections 218 and 226(e), PLAINTIFF and members of the Itemized Statements Class are entitled to recover the full amount of penalties due under Labor Code Section 226(e), reasonable attorney's fees and costs of suit.

FOURTH CAUSE OF ACTION

FAILURE TO PAY ALL WAGES TIMELY UPON SEPARATION OF EMPLOYMENT
(Against all Defendants)

55. PLAINTIFF incorporates paragraphs 1 through 51 of this complaint as if fully alleged herein.

56. At all relevant times, PLAINTIFF and the other members of the Final Wages Class were employees of DEFENDANTS covered by Labor Code Sections 201 or 202.

57. Pursuant to Labor Code Sections 201 or 202, PLAINTIFF and members of the Final Wages Class were entitled upon termination to timely payment of all wages earned and unpaid prior to termination. Discharged employees were entitled to payment of all wages earned and unpaid prior to discharge immediately upon termination. Employees who resigned were entitled to payment of all wages earned and unpaid prior to resignation within 72 hours after giving notice of resignation or, if they gave 72 hours previous notice, they were entitled to payment of all wages earned and unpaid prior to resignation at the time of resignation.

58. DEFENDANTS failed to pay PLAINTIFF and members of the Final Wages Class all wages earned and unpaid prior to termination in accordance with Labor Code Section 201 or 202. PLAINTIFF is informed and believes and thereon alleges that at all relevant times within the limitations period applicable to this cause of action, DEFENDANTS maintained a policy or practice of not paying hourly employees upon separation of employment wages for all hours worked and/or not paying them final wages timely upon separation of employment.

59. DEFENDANTS' failure to pay PLAINTIFF and members of the Final Wages Class all wages earned prior to termination timely in accordance with Labor Code Sections 201 or 202 was willful. DEFENDANTS had the ability to pay all wages earned by hourly workers prior to termination in accordance with Labor Code Sections 201 or 202,

but intentionally adopted policies or practices incompatible with the requirements of Labor Code Sections 201 or 202. When DEFENDANTS failed to pay hourly workers timely upon termination all wages earned prior to termination, DEFENDANTS knew what they were doing and intended to do what they did.

60. Pursuant to Labor Code Section 201 or 202, PLAINTIFF and members of the Final Wages Class are entitled to all wages earned prior to termination that DEFENDANTS did not pay them.

61. Pursuant to Labor Code Section 203, PLAINTIFF and members of the Final Wages Class are entitled to continuation of their wages, from the day their earned and unpaid wages were due upon termination until paid, up to a maximum of 30 days.

62. As a result of DEFENDANTS' conduct, PLAINTIFF and members of the Final Wages Class have suffered damages in an amount, subject to proof, to the extent they were not paid for all wages earned prior to termination.

63. As a result of DEFENDANTS' conduct, PLAINTIFF and members of the Final Wages Class have suffered damages in an amount, subject to proof, to the extent they were not paid all continuation wages owed under Labor Code Section 203.

64. Pursuant to Labor Code Sections 218, 218.5 and 218.6, PLAINTIFF and members of the

Final Wages Class are entitled to recover the full amount of their unpaid wages, continuation wages under Section 203, interest thereon, reasonable attorney's fees and costs of suit.

FIFTH CAUSE OF ACTION

UNFAIR COMPETITION
(Against all Defendants)

65. PLAINTIFF incorporates paragraphs 1 through 61 of this complaint as if fully alleged herein.

66. The unlawful conduct of DEFENDANTS alleged herein constitutes unfair competition within the meaning of Business and Professions Code Section 17200. Due to their unfair and unlawful business practices in violation of the Labor Code, DEFENDANTS have gained a competitive advantage over other comparable companies doing business in the State of California that comply with their obligations to pay employees for all hours worked.

67. As a result of DEFENDANTS' unfair competition as alleged herein, PLAINTIFF and members of the Wages Class have suffered injury in fact and lost money or property. PLAINTIFF and members of the Wages Class have been deprived of their rights to minimum wages for all hours worked, overtime wages for all overtime hours worked, accurate wage statements, and/or timely payment of

all earned wages due upon termination of employment.

68. Pursuant to Business and Professions Code Section 17203, PLAINTIFF and members of the Wages Class are entitled to restitution of all wages and other monies rightfully belonging to them that DEFENDANTS failed to pay them and wrongfully retained by means of their unlawful and unfair business practices.

PRAYER FOR RELIEF

WHEREFORE, PLAINTIFF on behalf of himself and all others similarly situated, pray for relief and judgment against DEFENDANTS as follows:

A. An order that the action be certified as a class action;

B. An order that Plaintiffs be certified as the representatives of the Class;

C. An order that counsel for PLAINTIFF be confirmed as Class counsel;

D. Damages for unpaid minimum and overtime wages;

E. Liquidated damages;

F. Statutory penalties under Labor Code Section 226(e);

G. Damages for unpaid wages earned prior to termination of employment;

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No.	CV 09-4207 DSF (RCx)	Date	6/29/09

Title Guadalupe Arevalo, et al. v. Gruma Corp., et al.

Present: The Honorable DALE S. FISCHER, United States District Judge

Debra Plato	Not Present
Deputy Clerk	Court Reporter
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
None Present	None Present

Proceedings: (IN CHAMBERS): **ORDER TO SHOW CAUSE RE REMAND TO STATE COURT**

On June 12, 2009, this action was removed to this Court pursuant to 28 U.S.C. § 1441. However, the jurisdictional allegations appear to be defective for the reasons opposite the boxes checked:

[ ] Removal is on the basis of federal question jurisdiction pursuant to 28 U.S.C. § 1331, but it appears that the claims may not "arise under" federal law.

[ ] Removal is on the basis of federal question jurisdiction pursuant to 28 U.S.C. § 1331 on grounds of the artful pleading doctrine, but the claims do not appear to be completely preempted.

[ ] Removal is on the basis of diversity jurisdiction pursuant to 28 U.S.C. § 1332(a), but all plaintiffs are not diverse from all defendants. *See Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806).

[ ] Removal is on the basis of diversity jurisdiction pursuant to 28 U.S.C. § 1332, but the pleadings set forth the residence, rather than the citizenship, of some of the parties. Diversity is based on citizenship.

[ ] Removal is on the basis of diversity jurisdiction pursuant to 28 U.S.C. §

1332, but the pleadings fail to allege the citizenship of some of the parties.

[ ] Removal is on the basis of diversity jurisdiction pursuant to 28 U.S.C. § 1332. A partnership, limited liability company, or other unincorporated association is joined as a party. The Court must consider the citizenship of each of the partners, including limited partners, or members. The citizenship of each of the entity's partners or members must therefore be alleged. *Carden v. Arkoma Assocs.*, 494 U.S. 185 (1990); *United Steelworkers v. Bouligny, Inc.*, 382 U.S. 145 (1965); *Johnson v. Columbia Props. Anchorage, LP*, 437 F.3d 894 (9th Cir. 2006); *Rockwell Int'l Credit Corp. v. U.S. Aircraft Ins. Group*, 823 F.2d 302 (9th Cir. 1987).

[X] Removal is on the basis of diversity jurisdiction pursuant to 28 U.S.C. § 1332. Some of the parties are corporations. The notice of removal is deficient because:

[ ] the notice of removal does not state both the respective state of incorporation and principal place of business. 28 U.S.C. § 1332(c).

[X] the jurisdictional averment by defendants is patently

insufficient under 28 U.S.C. § 1332(c). Defendants fail to offer adequate facts to support the assertion that the principal place of business stated in the Notice of Removal is the corporate party's principal place of business. Defendants must apply the "total activities" test, which takes into account all aspects of the corporation's business, including where its operations are located, where it supervises that business, and where it employs persons and conducts its business. *Indus. Tectonics, Inc. v. Aero Alloy*, 912 F.2d 1090, 1094 (9th Cir. 1990). This entails (1) determining the location of the majority of the corporation's (a) employees, (b) tangible property, and (c) production activities, and (2) ascertaining where most of the its (a) income is earned, (b) purchases are made, and (c) sales take place. *Id.* The alternate "nerve center" test may only be applied if defendant(s) establish(es) pursuant to the foregoing factors that no state contains a substantial predominance of the corporation's business activities.

Id. Under this test, a corporation's principal place of business is where its executive and administrative functions are performed. *Id.* at 1092.

[ ] Removal is on the basis of diversity jurisdiction pursuant to 28 U.S.C. § 1332, one or more of the parties is named in a representative capacity, and the citizenship of the represented person is not alleged or appears not to be diverse. 28 U.S.C. § 1332(c)(2).

[ ] Removal is on the basis of diversity jurisdiction pursuant to 28 U.S.C. § 1332, but defendants fail to allege the existence of diversity jurisdiction both at the time the action was commenced and at the time of removal. *See Strotek Corp. v. Air Transport Ass'n. of Am.*, 300 F.3d 1129, 1131-32 (9th Cir. 2002).

[ ] Removal is on the basis of diversity jurisdiction pursuant to 28 U.S.C. § 1332(a), but the amount in controversy may not exceed $75,000. The notice of removal is deficient because:

[ ] the amount of damages plaintiff seeks is unclear from the complaint and, therefore, defendant bears the burden of proving facts to support a finding

that the amount in controversy exceeds $75,000 by a preponderance of the evidence. *Sanchez v. Monumental Life Ins. Co.*, 102 F.3d 398, 404 (9th Cir. 1996). A "mere averment" that the amount in controversy exceeds $75,000 is insufficient. *Gaus v. Miles, Inc.*, 980 F.2d 564, 567 (9th Cir. 1992). It is not facially evident from a complaint that the amount in controversy exceeds $75,000, where the only explicit dollar figure sought in the complaint is less than $75,000, and unspecified amounts are sought for emotional distress, punitive damages, and attorneys' fees. *See Valdez v. Allstate Ins. Co.*, 372 F.3d 1115, 1116-17 (9th Cir. 2004).

[ ] plaintiff affirmatively alleges that the amount in controversy is $75,000 or less and, therefore, the defendant bears the burden of proving by a "legal certainty" that the amount in controversy exceeds $75,000. *See Guglielmino v. McKee Foods Corp.*, 506 F.3d 696 (9th Cir. 2007) (recognizing that the "legal certainty" standard applies to CAFA actions where the plaintiff affirmatively alleges less than the jurisdictional

requirement and suggesting that it may also apply to similar diversity actions).

[X] Removal is on the basis of diversity jurisdiction pursuant to 28 U.S.C. § 1332(a); the action involves multiple plaintiffs and/or is a class action. The pleadings do not state that at least one of the named plaintiffs has a claim exceeding $75,000. Where the action does not implicate a common fund or a joint interest, at least one of the named plaintiffs must meet the amount in controversy requirement. *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 125 S. Ct. 2611, 2615 (2005). Where injunctive relief is sought in a multiple plaintiff action, the Ninth Circuit has held that "the amount in controversy requirement cannot be satisfied [merely] by showing that the fixed administrative costs of compliance exceed $75,000." *In re Ford Motor Co./Citibank (S.D.), N.A. Cardholder Rebate Program Litig.*, 264 F.3d 952, 961 (9th Cir. 2001).

[ ] Removal is on the basis of diversity jurisdiction in a class action pursuant to 28 U.S.C. § 1332(d). The Notice of Removal is deficient because:

[ ] the total claims of individual class members do not appear to

exceed $5,000,000 in the aggregate, exclusive of interest and costs. 28 U.S.C. § 1332(d)(2), (6). Specifically:

[ ] the amount of damages plaintiffs seek is unclear from the complaint and, therefore, defendant bears the burden of proving facts to support a finding that the amount in controversy exceeds $5,000,000 by a preponderance of the evidence. *Lowdermilk v. U.S. Bank Nat'l Ass'n*, 479 F.3d 994, 998 (9th Cir. 2007). A "mere averment" that the amount in controversy exceeds $5,000,000 is insufficient. *Gaus v. Miles, Inc.*, 980 F.2d 564, 567 (9th Cir. 1992). Neither does an allegation based on information and belief constitute proof by a preponderance of the evidence. *Valdez v. Allstate Ins. Co.*, 372 F.3d 1115, 1117 (9th Cir. 2004).

[ ] plaintiffs affirmatively allege that the amount in

controversy is $5,000,000 or less and, therefore, the defendant bears the burden of proving by a "legal certainty" that the amount in controversy actually exceeds $5,000,000. *Lowdermilk*, 479 F.3d at 1000. Calculations based on unsupported assumptions are not sufficient. *Id.* at 1001. The defendant should substantiate its calculations with "concrete evidence" so that the amount in controversy can be estimated with certainty. *Id.*

[ ] the pleadings fail to allege that any member of a plaintiff class is a citizen of a state different from any defendant, that any member of a plaintiff class is a citizen or subject of a foreign state and any defendant is a citizen of a state, or that any member of a plaintiff class is a citizen of a state and any defendant is a citizen or subject of a foreign state. 28 U.S.C. § 1332(d)(2).

[ ] it appears that two-thirds or more of the members of all proposed plaintiff classes in the aggregate are citizens of the state in which the action was originally filed; the plaintiff class seeks significant relief from a defendant who is a citizen of that state and whose alleged conduct forms a significant basis for the claims; principal injuries were incurred in that state; and no related class action has been filed within the preceding three years. 28 U.S.C. § 1332(d)(4)(A).

[ ] it appears that two-thirds or more of the members of all proposed plaintiff classes in the aggregate and all of the primary defendants are citizens of the state in which the action was originally filed. 28 U.S.C. § 1332(d)(4)(B).

[ ] it appears that the primary defendants are states, state officials, or other governmental entities. 28 U.S.C. § 1332(d)(5)(A).

[ ] it appears that the total number of members of all proposed

plaintiff classes is less than 100. 28 U.S.C. § 1332(d)(5)(B).

[ ] the action appears to involve solely securities claims or claims relating to corporate governance as described in 28 U.S.C. § 1332(d)(9).

[ ] the action involves an unincorporated association, but its principal place of business has not been established. 28 U.S.C. § 1332(d)(10).

[ ] Defendant(s) fail(s) to offer adequate facts to support the assertion that the principal place of business stated in the Notice of Removal is the unincorporated association's principal place of business. Defendant(s) must apply the "total activities" test, which takes into account all aspects of the entity's business, including where its operations are located, where it supervises that business, and where it employs persons and conducts its business.

Indus. Tectonics, Inc. v. Aero Alloy, 912 F.2d 1090, 1094 (9th Cir. 1990). This entails (1) determining the location of the majority of the entity's (a) employees, (b) tangible property, and (c) production activities, and (2) ascertaining where most of the its (a) income is earned, (b) purchases are made, and (c) sales take place. *Id.* The alternate "nerve center" test may only be applied if defendant(s) establish(es) pursuant to the foregoing factors that no state contains a substantial predominance of the entity's business activities. *Id.* Under this test, an entity's principal place of business is where its executive and administrative functions are performed. *Id.* at 1092.

[ ] the action involves an unincorporated association, but its state of organization has not been established. 28 U.S.C. § 1332(d)(10).

[ ] Removal is on the basis of diversity jurisdiction in a class action pursuant to 28 U.S.C. § 1332(d). The Court may decline to exercise its jurisdiction pursuant to 28 U.S.C. § 1332(d)(3) because it appears that greater than one-third but less than two-thirds of the members of all plaintiff classes in the aggregate and the primary defendants are citizens of California and one or more of the following applies:

[ ] the claims asserted do not involve matters of national or interstate interest. 28 U.S.C. § 1332(d)(3)(A).

[ ] the claims asserted will be governed by California law. 28 U.S.C. § 1332(d)(3)(B).

[ ] the class action has not been pleaded in a manner that seeks to avoid federal jurisdiction. 28 U.S.C. § 1332(d)(3)(C).

[ ] the forum in which the action was brought has a distinct nexus with the class members, the alleged harm, or the defendants. 28 U.S.C. § 1332(d)(3)(D).

[ ] the number of California citizens among all plaintiff classes in the

aggregate is substantially larger than the number of citizens of any other state, and the citizenship of the other members is dispersed among a substantial number of states. 28 U.S.C. § 1332(d)(3)(E).

[ ] no related class action has been filed during the preceding three years. 28 U.S.C. § 1332(d)(3)(F).

[X] The Court notes the following potential procedural defect:

[ ] not all served defendants have joined in the notice of removal. *See* 28 U.S.C. § 1441(a); *Parrino v. FHP, Inc.*, 146 F.3d 699, 703 (9th Cir. 1998).

[ ] the removing defendant(s) did not attach to the notice of removal a copy of all process, pleadings, and orders served on the defendant(s). 28 U.S.C. § 1446(a).

[ ] the removing defendant(s) did not file a copy of the notice of removal with the clerk of the state court. 28 U.S.C. § 1446(d).

[X] the notice of removal may have been filed more than thirty days after the date of service of the initial pleading or the date on which defendant first had notice of removability. 28 U.S.C. § 1446(b).

[ ] removal is on the basis of diversity jurisdiction pursuant to 28 U.S.C. § 1332, the case was *not* initially removable, and the notice of removal was filed more than one year after commencement of the action. 28 U.S.C. § 1446(b); *Ritchey v. Upjohn Drug Co.*, 139 F.3d 1313, 1316 (9th Cir. 1998).

[ ] removal is on the basis of diversity jurisdiction pursuant to 28 U.S.C. § 1332(a), but some of the defendants are California citizens. 28 U.S.C. § 1441(b).

[ ] Other:

Accordingly, the Court orders defendants to show cause in writing no later than July 15, 2009 why this action should not be remanded for the reasons noted above. If defendants require additional discovery to establish the citizenship of one or more plaintiffs or other defendants, defendants may request additional time to engage in

jurisdictional discovery, provided that such a request is made on or before the above deadline. This deadline shall not extend the time for responding to any motion for remand filed by plaintiffs. Plaintiffs may submit a response in the same time period. Plaintiffs must submit a response within 30 days of the date of removal if the defects are procedural and plaintiffs object and request remand. *See* 28 U.S.C. § 1447(c). The parties are reminded that courtesy copies are to be delivered to Chambers. Failure of defendants to respond by the above date may result in the Court **remanding** this action to state court.

The Court further orders the Court Clerk promptly to serve this order on both parties.

Deputy Clerk _____

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Attorneys for Defendant
GRUMA CORPORATION
(also known as "Mission Foods")

[FILED: JUN 12, 2009, CLERK, U.S. DISTRICT COURT, CENTRAL DIST. OF CALIF., LOS ANGELES]

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

GUADALUPE AREVALO, on behalf of himself and others similarly situated Plaintiff, v. GRUMA CORPORATION; MISSION FOODS; and DOES 1 to 100, inclusive, Defendants.	Case No. (CV09-04207RSWL (RCx)) **DEFENDANT GRUMA CORPORATION'S NOTICE OF REMOVAL OF CIVIL ACTION PURSUANT TO 28 U.S.C. §§ 1332, 1367, 1441, AND 1446**

[Los Angeles County
Superior Court Case
No. BC 410322]

TO THE CLERK OF THE COURT, PLAINTIFF AND HIS ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that Defendant Gruma Corporation (also known as "Mission Foods") [hereinafter, "Defendant"], through undersigned counsel, hereby removes the above-captioned action from the Superior Court of the State of California for the County of Los Angeles, to the United States District Court for the Central District of California, pursuant to 28 U.S.C. §§ 1332, 1367, 1441, and 1446.

I. BACKGROUND

1. On or about March 24, 2009, Plaintiff commenced this action by filing an unverified Complaint in the Superior Court of California, Los Angeles County, entitled *Guadalupe Arevalo v. Gruma Corporation; Mission Foods: and Does 1 to 100, inclusive*, and bearing the docket number BC410322 (the "Complaint"). (A true and correct copy of the Complaint is attached as Exhibit "A" to this Notice of Removal.)

2. The Complaint asserts claims for: (1) Failure to Pay Minimum or Contractual Wages In Violation of Labor Code §§ 1194, 1197 *et seq.*; (2)

Failure to Pay Overtime Wages in Violation of Labor Code §§ 1194 and 510; (3) Failure to Provide Accurate Wage Statements in Violation of Labor Code § 226; (4) Violation of Labor Code §§ 201 and 202 Resulting in § 203 Wages and Penalties for Failure to Pay Wages Due Former Employees at the Time of Resignation and/or Discharge; (5) Violation of Business and Professions Code Sections 17200 *et seq.*

3. Defendant has not yet answered Plaintiffs Complaint. Defendant intends to file a motion to dismiss the Complaint for failure to state a claim on which relief can be granted, pursuant to Fed. R. Civ. Pr. 12(b)(6), within the time allowed by law.

4. As set out more fully below, this Court has original jurisdiction over this action under 228 U.S.C. § 1332 and hence the action may be removed by Defendant pursuant to 28 U.S.C. § 1441. Original jurisdiction exists here because no defendant is a citizen of the same state as any plaintiff and the amount in controversy exceeds $75,000, exclusive of interest and costs.

II. DEFENDANT HAS SATISFIED THE PROCEDURAL REQUIREMENTS FOR REMOVAL

A. Timelines

5. Plaintiff attempted to serve Defendant with the Complaint on May 12, 2009 by delivering a

copy of the summons and complaint at one of Defendant's plants..

6. The Complaint is the initial pleading setting forth Plaintiff's claims for relief and hence the first notice to Defendant that this action is removable. This Notice of Removal is being filed fewer than 30 days after the service of the Complaint upon Defendant and is thus timely filed pursuant to 28 U.S.C. § 1446(b).

B. Consent Of Defendant

7. The Complaint names two defendants, "Gruma Corporation" and "Mission Foods." However, named Defendant "Mission Foods" is not a separate entity, but is a division within Gruma Corporation and a brand name employed by Gruma Corporation. Thus, there is but one actual defendant to this action, Gruma Corporation.

8. Thus, Defendant is the only party who must consent to removal and all defendants whose consent is required have consented to this removal.

C. Venue

9. The Superior Court of California, Los Angeles County is located within the Western Division of the Central District of California. Therefore, venue is proper in this Court pursuant to 28 U.S.C. 84(c)(2) because it is the "district and division embracing the place where such action is pending." 28 U.S.C. § 1441(a).

10. No previous application has been made for the relief requested herein. Pursuant to 28 U.S.C. § 1446(a), copies of all process, pleadings, and orders served upon Defendants are attached as Exhibits to this Notice of Removal. Pursuant to 28 U.S.C. § 1446(d), a copy of this Notice of Removal is being served upon counsel for Plaintiff and a copy is being filed with the Clerk of the Superior Court of California in Los Angeles County and with the Clerk of the Central District of California. True and correct copies of the Notice to the Plaintiff and the state court shall be filed promptly.

III. REMOVAL IS PROPER BECAUSE THIS COURT HAS DIVERSITY JURISDICTION PURSUANT TO 28 U.S.C. §§ 1332 AND § 1441

11. As set forth below, Plaintiff's claims as alleged in the Complaint are removable under 28 U.S.C. § 1332(a) (diversity of citizenship).

A. Diversity of Citizenship Requirement is Established

12. Based on the allegations of Plaintiff's Complaint, Plaintiff is a citizen of the State of California. (See Complaint, ¶4.)

13. No defendant is a citizen of the State of California:

a. Gruma Corporation is a citizen of Nevada or Texas for purposes of diversity

jurisdiction. Defendant was at the time of the filing of this action, and still is, a Corporation formed under the laws of the State of Nevada, with its principal place of business in the state of Texas. (A true and correct copy of the corporation details related to Gruma Corporation from the Nevada Secretary of State is attached to the Decker Declaration as Exhibit "A"). Pursuant to 28 U.S.C. Section 1332(c), "a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business." Defendant's principal place of business is located in the state of Texas because its corporate headquarters are located there and the majority of the administrative functions crucial to its day-to-day operations are performed in that state. The offices of Defendant's executive employees are also located in Texas and the majority of its corporate decisions are made there. Since Defendant conducts operations in at least 25 different states, its principal place of business is determined by the location of its corporate and administrative headquarters, which are located in Texas. Accordingly, Defendant is not a citizen of the State of California.

b. The citizenship of fictitiously-named "Doe" defendants is to be disregarded for the purposes of removal. 28 U.S.C. § 1441(a).

14. Accordingly, the diversity of citizenship requirements under 28 U.S.C. § 1332(a)(1) are met.

B. The Amount-in-Controversy Requirement is Satisfied

15. From the allegations of the Complaint, it is evident that the claims exceed $75,000. *See Sanchez v. Monumental Life Ins. Co.*, 95 F.3d 856, 860-62 (9th Cir. 1996); *Lucett v. Delta Airlines, Inc.*, 171 F.3d 295, 298 (5th Cir. 1999). In determining whether the jurisdictional minimum is met, the Court considers all recoverable damages, including emotional distress damages, punitive damages, statutory penalties, and attorneys' fees, *See Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 347-48 (1977); *Galt G/S v. JSS Scandinavia*, 142 F.3d 1150, 1155-56 (9th Cir. 1998); *Anthony v. Security Pac. Fin'l Services, Inc.*, 75 F.3d 311, 315 (7th Cir. 1996).

16. In the Complaint, Plaintiff purports to seek damages on behalf of four putative classes, each of which consists of at least 1,000 members. (Complaint ¶23(a).) The Complaint alleges Defendant owes the members of the first class "additional hours or minutes" of wages "for every day worked," (Complaint ¶13.) The Complaint further alleges that Defendant failed to pay the members of the second class overtime wages on those occasions where they worked in excess of eight hours in a day or 40 hours in a week. (Complaint ¶14.) Complaint alleges that, as a result of these two failures, Defendant also failed to provide accurate itemized wages statements to its employees and failed to pay all wages due at termination. (Complaint ¶¶15-16.)

17. Plaintiff seeks damages for all class members consisting of (i) wages due for hours worked but not compensated; (ii) overtime wages fur overtime hours worked; (iii) penalties under Labor Code Section 203, and (iv) restitution under Business and Professions Code Section 117203 of all monies allegedly owed but unlawfully withheld by Defendant. (Complaint ¶19.) Plaintiff also seeks, interest, attorney's fees and punitive damages. (Complaint, Prayer for Relief at J, L & M.)

18. Based on Plaintiffs allegations, there are at least 4,000 putative class members. (Complaint ¶23(a).) Even if the average recovery for each putative class member were only $19, the total recovery would exceed $75,000. Moreover, even if each putative class member earned only the minimum wage, a single hour of unpaid wages during the relevant period would provide damages of between $6.75 and $8.00, given the minimum wages in effect during the class period. Plaintiff, however, alleges that Defendant had a *policy* failing to pay for all hours worked or for overtime, which necessarily implies that these failures were systematic, not isolated, and thus each putative class member was denied proper compensation on a consistent and regular basis. (Complaint ¶¶13-16.) Plaintiff seeks back wages for all class members for four years prior to the filing of the Complaint. (See Complaint ¶19 & 20(a)-(d).) These back wages, plus applicable interest and penalties, along with attorney's fees and costs, must easily exceed $19 per putative class member.

19. Although Defendant specifically denies Plaintiffs claims and denies that Plaintiff will recover any of the relief he seeks, it is clear from the scope of the relief sought that the amount in controversy arising from the relief Plaintiff seeks easily exceeds the $75,000 jurisdictional threshold of 28 U.S.C. § 1332(a).

IV. REMOVAL IS PROPER BECAUSE THIS COURT HAS SUPPLEMENTAL MATTER JURISDICTION PURSUANT TO 28 U.S.C. §§ 1332 AND § 1367

20. As set forth above, Plaintiffs claims as alleged in the Complaint are removable under 28 U.S.C. § 1332(a) (diversity of citizenship).

21. To the extent this Court would not otherwise have jurisdiction over any claim, it may exercise supplemental jurisdiction over such a claim pursuant to 28 U.S.C. § 1367.

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22. In the event this Court has a question regarding the propriety of this Notice of Removal, Defendant requests that it issue an Order to Show Cause so that it may have an opportunity to more fully brief the basis for this removal.

WHEREFORE, Defendant Gruma Corporation removes the above-action to this Court.

DATED: June 11, 2009

OGLETREE, DEKINS, NASH, SMOAK & STEWART, P.C.

By: /s/ Christopher W. Decker
Christopher W. Decker
Attorneys for Defendant
GRUMA CORPORATION
(also known as "Mission Foods")